THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil Action No.**
	)	**96-1285 (RCL)**
GALE A. NORTON	)	
SECRETARY OF THE INTERIOR, et al.	)	
	)	
Defendants	)	
	)	
	)	

EIGHTH REPORT OF THE COURT MONITOR

I. INTRODUCTION

This is the eighth report in a series of reports submitted by the Court Monitor pursuant to this Court's appointment Order of April 16, 2001, (and April 15, 2002 reappointment Order) to review and monitor "all of the Interior defendants' trust reform activities and file written reports of (the Court Monitor's) findings with the Court."

This report will address the Court Monitor's review of the progress of trust reform with respect to the Secretary of the Interior's actions regarding the historical accounting since the Fifth Report of the Court Monitor ("Fifth Report") submitted to this Court on February 1, 2002, to include the "Report to Congress on the Historical Accounting of Individual Indian Money Accounts" ("Report") submitted by Defendants to this Court and Congress on July 2, 2002.

II. DISCUSSION

A. Legal/Procedural History – Historical Accounting

The history regarding the Defendants' past actions with respect to their fiduciary trust obligations to conduct an historical accounting has been previously recounted in the First and Fifth Reports of the Court Monitor and will be summarized, in part, here.

This Court, in its December 21, 1999 decision held:

"1. The Indian Trust Fund Management Reform Act, 25 U.S.C. Sections 162a *et seq.,* requires defendants to provide plaintiffs an accurate accounting of *all money in the IIM trust* held in trust for the benefit of plaintiffs, *without regard to when the funds were deposited.*" Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) at 58, emphasis added.

Following appeal by Defendants, the United States Circuit Court of Appeals for the District of Columbia ("Circuit Court"), in affirming this Court's decision, held on February 23, 2001 that:

"Contrary to appellants' claims, Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for '*all* funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.' 'All funds' means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938). Therefore, the 1994 Act reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets. " *Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir. 2001) at 1102, citations omitted, emphasis in original.

The reasoning behind this affirmation by the Circuit Court of this Court's decision regarding the Defendants' fiduciary obligation to conduct an "all funds" historical accounting was based on two findings important to this review of the status of the Defendants' historical accounting efforts. First, the Circuit Court held that there had been "final agency action" on which to base the review that this Court had carried out regarding the Defendants' fiduciary obligations regarding the Indian Trust. It stated:

"This is not to say that the district court lacked jurisdiction to hear plaintiffs' claims, however. Where a federal court has jurisdiction to hear challenges to an agency action it also has jurisdiction over claims of unreasonable delay. As this court has noted in the past, where 'an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review.' Were it otherwise, agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action.

In the case at bar, it is clear that the federal government has been under an obligation to discharge the fiduciary duties owed to IIM trust beneficiaries for decades. It is also clear that refusing to hear plaintiffs' claims could unduly prejudice their rights as trust beneficiaries. The district court's findings of fact, largely unchallenged by the government, make clear that insofar as the federal government owes trust beneficiaries a duty to maintain records and provide an accounting, delaying review is tantamount to denying review altogether. The district court further concluded that appellants' extensive delay in discharging their fiduciary duties was unreasonable. In such circumstances, federal courts may exercise jurisdiction to compel agency action 'unlawfully withheld or unreasonably delayed.'

Even assuming, as appellants argue, that the 1994 Act effectively reset the clock for a finding of unreasonable delay, appellant's 'reasonable time to discharge' its fiduciary obligations 'has expired.' The district court's judgment came down over six years after passage of the 1994 Act. During that time, deadlines were missed, documents destroyed, and, in the words of the district court, appellants had yet to progress much beyond planting the 'seed' for discharging their fiduciary obligations. Courts owe substantial deference to agency prerogatives in fulfilling their legal obligations, especially where Congress intervenes to address longstanding problems, as it did with the 1994 Act. But this does not require courts to turn a blind eye when government officials fail to discharge their duties.

….

…(I)t is beyond question that the government has delayed fulfilling its trust obligations for many years. The district court specifically found that IIM trust beneficiaries have been denied their rights – for decades. That Congress enacted its own remedial statute to address this unconscionable delay does not mitigate the egregious amount of time plaintiffs have waited for. As discussed below, the 1994 Act is not the source of plaintiffs' rights. Rather, it is designed to help rectify the government's longstanding failure. Given the record before it, the district court reasonably concluded that absent court intervention, discharge of the government's fiduciary obligations may yet be far off.

….

The district court noted that the consequences of further agency delay are potentially quite severe. Documents necessary for a proper accounting and reconciliation have been lost or destroyed, and the district court found little reason to believe that this would change in the near future. Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus it seems that 'the interests at stake are not merely economic interest in an administrative scheme, but personal interest in life and health.'

Concern for 'administrative convenience' certainly counsels against interfering with the government's reform priorities. ('Although the APA gives courts the authority to 'compel agency action unlawfully withheld or unreasonably delayed,' we are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case.'). Yet neither a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay, nor can the government claim that it has become subject to unreasonable expectations. Federal officials were aware of their fiduciary obligations long before the passage of the 1994 Act – let alone the initiation of this action – and yet little progress has been made in discharging those duties. What little progress the government has made appears more due to the litigation than diligence in discharging its fiduciary obligations. For these reasons, we find no basis for disturbing the district court's conclusion that

appellants unreasonably delayed the discharge of their fiduciary obligations, nor for upsetting the district court's exercise of jurisdiction under 5 U.S. C. (Section) **706 on this basis."** *Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir. 2001) at 1095-1097, citations omitted.

Having determined that the Defendants' failure to provide an accounting was final agency action subject to review by this court, the Circuit Court went on to address the government's attempt to claim the right to interpret limitations on its fiduciary duties to the IIM accountholders as defined in The Indian Trust Fund Management Reform Act ("1994 Reform Act"):

"Assuming that the 1994 Act is ambiguous, this does not enable the government to escape liability by interpreting away its fiduciary obligations. While ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, *Chevron* deference is not applicable in this case. The governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' Therefore, even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation 'careful consideration' but 'we do not defer to it.' This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." *Id.* at 1101, citations omitted.

Taking the above findings into consideration, the Circuit Court held that there was no need to alter this Court's Order to the Defendants to conduct an "all funds" historical accounting and concluded that:

"The actual legal breach is the failure to provide an accounting, not its failure to take the discrete individual steps that would facilitate an accounting. Thus, while the district court must amend its opinion on remand to account for this distinction, there is no need to alter the district court's order, as the bottom line is the same: By failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, appellants breached their duties." *Id.* at 1106.

The Circuit Court based its holdings on another principal enunciated in the opinion regarding the foundation for and the breadth of the fiduciary trust obligations owed by the government to the IIM accountholders, specifically, and Tribal beneficiaries in general. It stated:

"Section 101 of the 1994 Act does not *create* 'trust responsibilities of the United States.' Rather it lists some of the means through which the Secretary shall discharge these preexisting duties. For instance, the first listed duty is '(p)roviding adequate systems for accounting for and reporting trust fund balances.' This would

not be necessary to discharge the government's trust responsibilities were not the government *already* obliged to account for and report trust fund balances. Rather than exhaust the list of duties owed by the federal government to IIM trust beneficiaries, the 1994 Act clarified and augmented aspects of the government's preexisting obligations to facilitate their fulfillment.

This view of the federal government's fiduciary duties is supported by *Mitchell II* [1] **which held that 'a fiduciary relationship necessarily arises when the government assumes such elaborate control over … property belonging to Indians' – in particular where, as here, '(a)ll of the necessary elements of a common-law trust are present.' The general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law. While *Mitchell II* involved a claim for damages, nothing in that decision or other Indian cases would imply that appellants are not entitled to declaratory or injunctive relief. Such remedies are the traditional ones for violations of trust duties."** *Id.* at 1101, citations omitted, emphasis in original.

B. The Office of Historical Trust Accounting (OHTA)

On July 10, 2001, Secretary of the Interior Gale Norton (Secretary) issued ORDER NO. 3231, entitled, "Establishment of the Office of Historical Trust Accounting."[2] That Order appointed an Executive Director, Bert Edwards, to "**plan, conduct, direct, and execute the historical accounting of IIM accounts….**"[3] *Id.* at 1.

Pursuant to further direction in the Order, within sixty days, Edwards was to:

"(P)repare a comprehensive description and timetable for completion of all steps that are needed to staff and develop a comprehensive plan for a historical accounting that meets the Department's fiduciary obligations to IIM beneficiaries" and, within 120 days, was to "identify the preliminary work that can be done immediately." *Id.*

The Secretary also promulgated a memorandum on the same day entitled, "Action regarding Trust reform and Historical Accounting"[4] addressing the comprehensive plan which stated in part:

"Through this comprehensive plan, the Department will analyze *all options*, not just statistical sampling, so that we can demonstrate to Congress, the Court, IIM beneficiaries and the public that we have identified *the most cost-effective plan* to complete the historical accounting and thereby satisfy the Department's fiduciary duty." *Id.* at 2, emphasis added.

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[1] *United States v. Mitchell*, 463 U.S. 206.
[2] *See* Fifth Report, Tab 2
[3] *See*, generally, First Report of the Court Monitor for a history of events regarding the historical accounting leading up to the issuance of this Order.
[4] See Fifth Report, Tab 3.

Edwards prepared and published both of these documents.[5] Addressed at some length in the Fifth Report were the repeated references to the "temporal scope" of the historical accounting including statements regarding the District and Circuit Court opinions such as:

"These opinions will necessarily serve as guidelines in preparing a historical accounting of IIM funds." Fifth Report at 10.

"A final determination and delineation of the Government's fiduciary responsibilities and the obligation these responsibilities impose on the mandate to conduct the historical accounting will help define the scope of the project, establish starting frames, and set boundaries for what the Comprehensive Plan must address…. There are numerous aspects of the IIM trust accounts and requirements for the historical accounting that must be considered in determining the scope of the historical accounting." *Id.*

"Temporal Scope of the Historical Accounting – The Comprehensive Plan will define how far back in time the historical accounting must go to satisfy the requirement to provide IIM beneficiaries with the information to determine if the Government has fulfilled its trust obligations." *Id.*

"Interpretation of Results of Prior Audits and Settlements by Treasury and General Accounting Office…. The Comprehensive Plan will determine to what extent, if any, the Department will rely on the results of these already settled accounts in the rendition of the historical accounting. *Id.*

Additionally, in the Secretary's Status Report to the Court Number Eight, submitted to the Court on January 17, 2002[6], a statement was made concerning the Comprehensive Plan was made that:

"In part, this plan is intended to assist the Congress and the Court in determining what is a reasonable time period for an historical accounting. The Department's analysis will be detailed in the Comprehensive Plan for the historical accounting. *See* Fifth Report at 13.

Following interviews with Mr. Edwards and his staff about the reasons for these statements addressing the temporal scope of the historical accounting in light of this Court's decision and Order concerning the scope of the historical accounting, the Court Monitor wrote in the Fifth Report that:

"it is not clear that the Comprehensive Plan scheduled for submission to Congress in June 2002 will properly address the scope of the accounting as defined by this Court and the Circuit Court. The accounting method that was and still is to be

[5] *See* Fifth Report, Tabs 4 and 5.
[6] *See* Fifth Report, Tab 7.

determined by the Defendants has apparently become not only a *method* for accomplishing the accounting but also, in the mind of the Executive Director, a vehicle for determining the *scope* of the accounting due to outstanding and yet-to-be discovered legal issues." *See* Fifth Report at 15, emphasis in original.

As a result of this concern, the Court Monitor recommended in the Fifth Report that the Court should consider ruling on the outstanding partial summary judgment motions and any other issues raised by the parties on potential legal limitations to the scope of the historical accounting. *Id.* at 17. The Court Monitor also recommended that this Court should give consideration to setting a date for a Phase II trial regarding the historical accounting based on the Defendant's perceived course of action regarding limiting the historical accounting. *Id.* at n. 8.

The Defendants took issue with the Fifth Report's recommendations in the Department Of The Interior's Response To The Fifth Report Of The Court Monitor filed on March 1, 2002. First, they objected to any judicial consideration of potential legal issues relating to the scope of the accounting until the issuance of "final agency decisions on such matter." *Id.* at 12. Citing to the Administrative Procedures Act's (APA) definition of scope of judicial review, the Defendants contended that:

"The Court plainly has jurisdiction to monitor Interior's actions in coming into compliance with its duty to account. Nonetheless, the APA limits the Court's jurisdiction to act in the absence of final agency action…. Interior has not yet taken final agency action with regard to any of the historical accountings. As described above, many outstanding legal and practical issues (some recognized explicitly by this Court as well as the Court of Appeals) potentially affect the scope of the accounting for particular individual account holders (or subclasses of account holders), including but not limited to the effect of relevant statutes of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and prior settlements of IIM account holders' claims. These issues, which involve the application of law to potentially diverse factual predicates, cannot, consistent with this Court's jurisdiction under the APA, be reviewed in the absence of a final agency decision and should not, in any event, be decided in the abstract without factual context. *Id.* at 16.

Further, Defendants cautioned this Court that they were in the midst of a decision making process on the historical accounting and:

"As facts are developed, final agency actions will be taken by the Secretary and her factual and legal determinations will be subject to review by the Court…. The Court of Appeals made clear that this is an APA case, and the APA permits review of 'final agency action.' No final agency action that is inconsistent with this Court's declaratory judgment order or otherwise not in accordance with law would survive such review." *Id.* at 16-17.

Noting that they had "coincidentally" filed a motion late on the same day the Fifth Report was filed asking this Court for permission to withdraw their three pending summary judgment motions, Defendants continued to argue that any opinion on their motions would be advisory and in violation of the Court's APA jurisdiction (not withstanding the fact that they had asked the Court in those motions to do exactly what they now were arguing could not be done).

Defendants further argued that no date for a Phase II trial could be set in compliance with the Court's APA jurisdiction because:

"**the record before the agency, not some new record developed at trial, should form the basis of this Court's review of Interior's actions**." *Id.* at 18.

The Court Monitor's suggestion to set a trial date would:

"**not be consistent with the Court of Appeals decision outlining the limits of this Court's jurisdiction, and, in any event, asks for relief that is not feasible by requiring that all of the historical accountings be completed by a date certain. As explained above, the review of Interior's final historical accountings should be based on the administrative record prepared and submitted to the Court**." *Id.* at 20, citations omitted.

The Defendants stated:

"Moreover, setting a trial date would prematurely compel the completion of the historical accountings by a date certain. Interior agrees with this Court and the Court of Appeals that an accounting is long overdue, and has taken substantial steps to begin what can only be described as a monumentally complex task…. Of course, this Court will continue to monitor Interior's progress in discharging its fiduciary duties through the quarterly reporting process. As accountings which constitute final agency action are completed for individual IIM account holders or subclasses or account holders, the Court will review Interior's work. *Id.* at 21-22, citations omitted.

Finally, Defendants addressed the actions of the Court Monitor in reviewing the progress of the historical accounting work of Mr. Edwards by taking the position that:

"Also inconsistent with the nature of this case are the significant portions of the Fifth Report addressing the mental processes of OHTA officials who are in the midst of decision making. Probing the mental processes of administrative officials is disfavored when a final agency action is reviewed. Where no final agency action has yet been taken, probing the mental processes of decision makers as they make their decisions is particularly questionable, and risks premature judicial interference with the agency's decision making process." *Id.* at 22, citations and footnote omitted.[7]

[7] The Defendants have since refused to permit the Court Monitor to conduct depositions of Mr. Edwards or other of Defendants' employees concerning the historical accounting under this and other theories. Thus

Defendant's Status Report to the Court Number Nine, filed on May 1, 2002, again addressed the Comprehensive Plan for the historical accounting by stating, in part:

"The Comprehensive Plan will discuss the Department's approach towards account activity during the Twenty-first Century (i.e., the period from January 1, 2001, to the present.

Given the breadth of the accounting project, OHTA anticipates that the Comprehensive Plan will generally describe in what order the accountings will occur and the methodology that will be applied." *Id.* at 71.

And further:

"… it is clear that the historical accounting project will require labor-intensive records searches that will occur over a long period of time." *Id.* at 78.

C. The Special Trustee's Opinion of OHTA's Historical Accounting

On April 30, 2002, the Special Trustee, Tom Slonaker, wrote to the Secretary of the Interior about, among other trust issues, the historical accounting, then under preparation by Mr. Edwards, as reported in the Seventh Report of the Court Monitor. In a memorandum entitled, "Going Forward on Trust Reform," he stated in part:

"OST was never assigned responsibility for conducting an historical accounting. Rather it was asked to assess the feasibility of conducting such an accounting. Because of the incomplete nature of the IIM records and the lack of any security measures designed to protect the trust data in the numerous data systems employed within the Department over the years, *I do not believe an accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed. Short of a settlement, the best that might be able to be accomplished is the identification of the gaps in the information*. With that, the Department could, perhaps, seek some instruction for the Judge on how to proceed. *I remain concerned, however, that I have not heard anyone in the Department define the characteristics of an accounting to include anything more than the funds actually collected by the Department. That, of course, is inadequate*."[8] *Id.*, emphasis added.

Mr. Edwards responded to this statement in a memorandum to Mr. Slonaker dated May 8, 2002, entitled, "Characteristics of an Accounting" (**Tab 1**). In that memorandum to the Special Trustee, Edwards stated:

"I was surprised to read in the *Seventh Report of the Court Monitor* that you expressed concern to the Secretary on April 30, 2002, that you do not believe an

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this Report is based, for the most part, on the written record available to the Court Monitor.

[8] Seventh Report at Tab 11, page 3.

accounting "acceptable to either the beneficiaries or the Special Trustee" can be constructed and that you have concerns regarding the characteristics of the Department's accounting. As Executive Director of the historical accounting project, I expected that you would have expressed any concerns you may have to me, or at least inquired as to the status of the project at some point since OHTA was created in July 2001.

Your statement implies that you have certain expectations regarding the characteristics of an adequate accounting and that those expectations likely cannot be met. It would be very useful as we move forward if you would specify your expectations of an adequate accounting and what research and/or assumptions you have relied upon in concluding that these expectations cannot be met. Again, although I would have preferred that you had expressed your views sooner and directly to me, I welcome your thoughts." *Id.,* emphasis in original.

Special Trustee Slonaker replied in a memorandum to Edwards, dated May 22, 2002, entitled, "Characteristics of an Accounting" (**Tab 2**). The Special Trustee copied the memorandum to the Deputy Secretary, J. Steven Griles, and to the Director, Office of Indian Trust Transition, Ross Swimmer. In it he stated:

"The American Indian Trust Fund Management Reform Act of 1994 reconfirms the Secretary's trust responsibility to Indian tribes and individual Indians for whom the Government holds funds in trust. The Secretary has a responsibility to account for the daily and annual balances of trust funds and must provide to each account holder quarterly statements of account performance. The language of the statute codified at 25 U.S. C. 4011 (b) provides a general description of what those periodic accountings must contain. However, it defines the minimum information that is to be provided because the statute at 25 U.S. C. 162 a(d) states that "the Secretary's proper discharge of the trust responsibilities of the United States shall include "<u>but are not limited to</u>) (sic) **the following:" emphasis added. Therefore it is necessary to look to sources in addition to Federal statutes to discover what is required of the Department as trustee.**

The three dissenting Justices in Mitchell II (<u>U.S. v. Mitchell</u>, 463 U.S. 206 (1983) clearly understood that to be the state of the law defined by the majority in that decision. The dissenters restated the Court's decision saying: today the Court

'has substituted a … presumption, applicable to the conduct of the United States in Indian affairs that the United States has consented to be sued for statutory violations <u>and other departures from the rules that govern private fiduciaries</u>" … even though "(N)one of the statutes contains any 'provision… that expressly makes the United States liable' for its alleged mismanagement of Indian… resources and their proceeds…," emphasis added.

That view had been confirmed by the 1994 Reform Act with the language found at 162 a(d) quoted above.

Like a private trustee, the Department is responsible for identifiable assets held in trust for identifiable beneficiaries and is required to manage those assets, make prudent investment decisions, and provide 'account holders with periodic statements of their account performance' (25 U.S. C. 162 a (d) (5)). The acceptable scholarship in trust administration holds that a trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. Those accountings are to show 'in detail the nature and amount of the trust property and the administration thereof' (See: Restatement, Second, Trusts Section 172). A beneficiary always is entitled to such information in order to enable him to enforce his rights as the beneficiary or prevent or redress a breach of trust. Because such information is of value to the beneficiary, it should be protected and managed like the trust asset it is.

It is also my opinion that in the event the trustee fails to provide clear and accurate information to the beneficiary, all doubts will be resolved against it and not in its favor. 'The trustee alone is in a position to know all the facts concerning the administration of the trust, and obviously he cannot be permitted to gain possible advantage from his failure to keep proper records' (See: Scott on Trusts, Fourth Edition, Section 172).

It is evident that the long-term record of the Department's administration of the Indian trust accounts is incomplete to some degree. In addition, during the past year the Special Master has been able to breach the Department's electronic systems that house the trust data thereby demonstrating that the data may not be accurate. *Because it is the duty of the trustee to know all the facts about the administration of the trust, these flaws cause me to doubt the ability of the Department to show either itself or the beneficiaries in sufficient detail the nature and amount of the trust property and its administration*. It is not my opinion that the efforts of your Office lack merit, however. Reconstructing the trust accounts to the extent allowed by the existing records is an important step in the Department's effort to bring integrity to the trust information database and to be more accountable to the beneficiaries.

I would be pleased to share with you my thoughts going forward." *Id.* at 1-2, emphasis added.

The Special Trustee again wrote to Mr. Edwards on June 5, 2002 in a memorandum entitled. "Historical Accounting for 8,006 Judgement (sic) Accounts" (**Tab 3**). He stated in part:

In your May 10, 2002, memorandum, subject as above, you summarized the reconciliation work OST contracted CD&L to conduct on selected IIM judgement (sic) accounts and the quality review results your office chartered Grant Thornton LLP to perform. *Your memorandum further requests this office's concurrence that this work and its independent verification constitute an historical accounting for this type of account.*

Absent an overall historical accounting definition for all IIM accounts or a specific definition by account type by either the Court, the litigation team, the Department, or OHTA, I cannot concur that the reconciliation of the judgement (sic) accounts constitutes an historical accounting. **As stated in their report, Grant Thorton LLP conducted a quality review of the agreed-upon procedures CD&L was tasked to perform. They determined that the CD&L procedures were conducted in accordance with the AICPA standards related to Consulting Services.**

Once an historical accounting is defined, I will be happy to reconsider my position should you desire." *Id.*, emphasis added.

There is no indication in the record of correspondence available to the Court Monitor that the Special Trustee's opinion as expressed to the Secretary and to Mr. Edwards has ever changed or that he has been consulted by Mr. Edwards for his advice on whether it would be possible to do an historical accounting consistent with the fiduciary obligations of the Defendants to the IIM account holders. Nor is their any evidence or statement in the Report that he was asked to or did approve the Report. It, therefore, must be assumed that he did not participate in the preparation of the Report and was not asked to, or did not, approve OHTA's work and the Report's conclusions.[9]

III. REPORT TO CONGRESS ON THE HISTORICAL ACCOUNTING OF INDIVIDUAL INDIAN MONEY ACCOUNTS

A. Foreword and Executive Summary

On July 2, 2002, the Defendants submitted to Congress and this Court the Report. At over 100 pages in length, it will not be more than summarized in this Eighth Report. However, for the purposes of the Eight Report's review of the progress of trust reform, specifically with respect to the historical accounting, a number of the Report's statements will be quoted and later reviewed.

The Report's foreword stated that it was prepared in compliance with Congressional direction contained in Interior's appropriation for FY 2001. It quoted from the Conference Committee Report that stated:

"(T)he (Congressional) managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results. This plan must be provided to the House and Senate Committees of Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes. H.R. Conf. Rep. No. 106-914, at 150 (2000)." *Id.* at v.

[9] If he did, it can be expected that Defendants will so state in their response to this Eighth Report.

The Report also noted that the Conference Committee Report on Interior's FY 2002 budget reiterated this planning requirement and stated:

"funds appropriated for a (sic) historical accounting 'may not be allocated prior to the report requested by the Committees detailing the methods and costs associated with an historical accounting." H.R. Conf. Rep. No. 107-234, at 99 (2001)." [10]

The Executive Summary of the Report discussed this Court's December 21, 1999 decision and Order by stating in part:

"The District Court required the Secretary to 'provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.'

….

This *Report to Congress on the Historical Accounting of Individual Indian Money (IIM) Accounts* (Report) fulfills the Congressional requirement noted above. This

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[10] The quoted section of the Conference Report on the 2001 budget was preceded by an explanation of why these directions were provided by the Conference Committee. The Conference Report discussion of the historical accounting began by stating:

"The Department of the Interior has announced its intention to explore the use of sampling as the best, most cost effective approach to provide an accounting for IIM beneficiaries. While the Indian Trust Fund Reform Act contemplated that such an accounting would sometime occur, the managers have been concerned for years about the potential cost and effectiveness of any approach that might be used. After investing $20 million over five years in a tribal account reconciliation process, there has been no resolution of issues surrounding tribal accounts. The cost of a similar accounting for the approximately three hundred thousand IIM account holders could conceivably cost hundreds of millions of dollars.

Therefore, while approving the request to begin an IIM sampling approach, the managers direct the Department to develop a detailed plan …." *See* First Report of the Court Monitor, Tab 2.

Also, the Conference Report on Interior's FY 2002 budget regarding the historical accounting was only partially quoted by the Report as addressed above. The statement reads in full as follows:

"The managers wish to clarify the language included in the House Report with respect to funding for an historical accounting. The managers note that both the House and Senate have provided the funds requested by the Administration for an historical accounting. However, the managers remain very concerned about the costs associated with such an accounting. Therefore, these funds may not be allocated prior to the report requested by the Committees detailing the methods and costs associated with an historical accounting.

The managers reiterate the position that they will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful. If the Department, working with the plaintiffs and the Court, cannot find a cost effective method for an historical accounting, the Congress may have to consider a legislative remedy to resolve this and other litigation related issues." *See* Fifth Report of the Court Monitor, Tab 6.

Report details what we expect to accomplish in accordance with the broadest reading of the Courts' opinions of the 1994 Act. Implementation of the activities described in this Report may be changed by court orders, other action by Congress, annual appropriations, or administrative actions…."

To comply with the requirements specified by Congress and the Courts, Interior proposes to gather transactions records and IIM-related documents to reconstruct the history of each IIM account." *Id.* at 3-4, footnote omitted.[11]

The Report went on to discuss the scope and cost of the historical accounting:

"Since 1985, most of the IIM Trust Fund financial information has been contained in electronic systems. However, the IIM accounts that existed prior to 1985, Interior will need to compile transaction histories from paper records. The available supporting documentation for the IIM account transactions that must be located and examined exists in some 120 office, warehouses, records centers, and archives. A significant portion of approximately 240 million pages of records will need to be collected, scanned, and indexed so that the records can be used to document transactions in the IIM accounts. It is not feasible to determine the total number of transactions for the IIM accounts since inception, but, for the period 1985-2000, the total is 44 million. For costing purposes, the total transactions since 1887 are estimated at over 100 million.

….

Interior proposes to divide the historical accounting project into three phases.

- **Phase I – Accounting for the current IIM accounts (as of December 31, 2000) during the period of 1985-2000 using electronic transaction data**

- **Phase 2 – Accounting for the current IIM accounts from account inception through 1985**

- **Phase 3 – Accounting for former IIM accounts closed prior to December 31, 2000.**

[11] The Executive Summary does not quote from the Circuit Court's decision regarding the scope of the historical accounting or either courts' reasoning except inferentially in stating that the Defendants' plan to accomplish the historical accounting with the **"broadest reading of the courts' opinions of the 1994 Act."** *Id.* at 3. That this Court's and the Circuit Court's opinions for why an "all funds" historical accounting was necessary were not based on the 1994 Act alone and incorporated the Supreme Court's *Mitchell II* reasoning regarding the fiduciary trust obligations of the United States with respect to all American Indian Trust beneficiaries, including the Plaintiff IIM account holders, were omitted by Defendants in this summary. A somewhat better explanation of the Courts' opinions was provided in the Introduction to the Report. However, the extent of the Defendants' fiduciary trust obligations and a definition of the proper scope of the historical accounting was not addressed.

In Phase I, Interior proposes to undertake the accounting for judgment and per capita IIM accounts first. Then, Interior proposes to examine 26,464,000 transactions (excluding interest) related to 193,766 land-based accounts that derive revenue from land-based allotment income. An additional 18 million transactions during 1985-2000 related to interest, and judgment and per capita accounts. The estimated cost for doing this work is $907 million or approximately $4,680 per account and $35 per transaction. The estimated cost for work in Phases 2 and 3 totals approximately $1.5 billion.

Interior cannot, at this time, project time frames and a completion schedule for the historical accounting work in Phase I. The actual historical accounting work will be conducted within the limits of funds appropriated by Congress for this purpose. Following completion of the Phase I, Interior will continue to work back in time through the IIM accounts in Phase 2 prior to 1985. It is not possible at this time to divide the work of Phase 2 because the IIM transaction data are not available in an electronic format.

The magnitude of the historical accounting is enormous. The 235,984 IIM accounts that existed on December 31, 2000, represent approximately a quarter to a third of all the IIM accounts that have existed since Interior began taking money into trust. Interior estimates that the total money collected since 1909 is approximately $13 billion.

The total cost for the historical accounting is estimated to be $2.4 billion. This Report includes information on how Interior will approach the historical accounting work and the costs associated with each unit of work in Phase I.

….

The proposed historical accounting plan is responsive to the requirements of Congress and the courts. However, Congress has also indicated a reluctance to 'appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful.' The full reconciliation of both current and former IIM accounts is an enormously complicated, complex, controversial and costly initiative. Ultimately, Interior's historical accounting activities will depend upon further direction as may be provided by the courts, other actions by Congress, or administrative actions." *Id* at 4-5, citation omitted.

For purposes of the Eighth Report, the body of the Report that addresses these conclusions found in the summary will not be reviewed and will be assumed to support the Executive Summary's statements. However, there are other statements within the body of the Report that bear quoting and later review.

B. Introduction

In the Introduction to the Report, the Defendants again expressed their opinion that the historical accounting project may be limited by Court orders, further action by Congress, available appropriations, or administrative action and state:

"This Report does not address any arguments available to the defendants in *Cobell v. Norton* or other litigation that would affect the scope of the historical accounting as a matter of law. *Id.* at 10.

The Defendants also quote more of the Conference Report No. 107-234 (2001) that stated:

"If the Department, working with the plaintiffs and the Court, cannot find a cost effective method for an historical accounting, the Congress may have to consider a legislative remedy to resolve this and other litigation related issues." *Id.*

The Defendants also listed a number of obstacles they would face in accomplishing the historical accounting:

- **"Errors in the electronic accounting system – The electronic records may have erroneous entries, missing information, duplicate accounts, and gaps in data. As the accounting proceeds, Interior may be able to verify the accuracy of the electronic data using contemporaneous, supporting hard-copy records.**

- **Missing transaction records and supporting IIM records – Some paper records may have been destroyed in accordance with document retention schedules at Interior, Treasury, or the General Accounting Office (GAO). Other paper records may have been damaged, may be missing, or may be in a condition too poor to use.[12]**

- **Missing land ownership information and revenue instruments – Land ownership records systems are maintained separately from the IIM financial records. Leases, contracts, right-of-way agreements, and other instruments may no longer be available.**

- **Increasing fractionation of allotments – For the past 65 years, allotments have generally been held in continuing trust status. As probate of trust assets has occurred, ownership of undivided interests in a single allotment has increased, with the result that there are allotments with hundreds or**

[12] Based on the history in this litigation regarding the destruction or loss of Indian trust records, the historical ability to hack at will into Defendants' unsecured computer systems containing electronic trust information, and Defendants' employees' own testimony of the lack of proper record keeping, one might severely question the Defendants' use of the term "may" regarding the extent of the destruction and loss of records which would be necessary to conduct a proper historical accounting.

even a thousand owners. Fractionation of ownership has challenged Interior's land recordkeeping. This could result in lease revenue being credited incorrectly.

- **Whereabouts unknown – There are approximately 62,000 account holders considered 'Whereabouts Unknown.' These IIM account holders have not provided Interior with current addresses and, thus, Interior cannot provide them with accounting statements. These accounts have a total balance of approximately $65 million.**

- **Special deposit accounts (SDAs) – SDAs are administrative accounts, some dating back several years, which have not been reconciled but may contain funds belonging to IIM account holders. There are approximately 21,000 SDAs with $68 million in balances, an unknown portion of which may be IIM trust funds.**

The extent to which these matters may affect meeting the accounting standard cannot be known until the accounting work proceeds and reports to IIM account holders are prepared. Interior is working to resolve known issues and minimize any negative effects on the accounting results.

….

Allotment owners may elect direct payments from surface and subsurface lessees to pay respective rents and royalties to the allotment owner(s). In these situations, no funds are taken into trust by the Interior IIM Trust Fund and, accordingly, no funds are deposited into the respective allotment owner's IIM account. Accordingly, Interior does not contemplate including such arrangements within the historical accounting. "[13] *Id.* at 13, emphasis added.

Defendants further defined the Phases of the proposed historical accounting in the Accounting Priority section of the Report. The phases would consist of:

"Phase 1: The Electronic Transaction Era for Current IIM Accounts

Phase 1 is a historical accounting for all the current accounts (IIM accounts on December 31, 2000), with a reconciliation during the Electronic Transactions Era from 1985 to December 31, 2000. Phase 1 includes 193,766 land-based IIM accounts that derive revenue from use of a land allotment (farming or grazing) or leasing of the resources on the allotment (oil and gas or timber), and 42, 218 judgment and per capita IIM accounts that derive revenue from tribal payments. Having the

[13] Query: If these direct payments are the result of the use by lessees of Indian Trust lands' surface and subsurface resources, are they not subject to treatment as trust assets requiring that they be accounted for regardless of whether or not the Defendants permitted them to be paid directly to IIM account holders? How can the Defendants or Plaintiffs determine the total funds due to the IIM account holder class as a result of an historical accounting without this Court first considering (and ruling on) the positions of the parties to this litigation on the legal issues behind this question?

accounting transactions in an electronic format facilitates analysis of both types of IIM accounts.

….

Phase 2: The Paper Transactions Era for Current IIM Accounts

There are an estimated 60,000 to 70,000 current accounts that were opened prior to 1985. These IIM accounts have transaction histories starting in the Paper Transactions Era and continuing into the Electronic Transaction Era. During Phase 1, the historical accounting will reconcile the transaction history in the Electronic Transaction Era for these IIM accounts. For example, if an IIM account were opened in 1975, by the end of Phase 1, the IIM account holder will receive a reconciliation covering the history of the transactions in their account from the first electronic transaction in 1985 to the balance as of December 31, 2000, although the 1985 opening balance could not be verified at that time. The portion of the IIM account in the Paper Transaction Era will be reconciled in Phase 2, and a comparison made of the account balances at the end of the Paper Transaction Era and the start of the Electronic Transaction Era.

Phase 2 comprises all the current IIM accounts (existing accounts on December 31, 2002) that have a portion of their account history in the Paper Transactions Era. The Phase 2 historical accounting is a reconciliation of the Paper Transactions Era portion of IIM accounts starting from inception of the IIM account to the first electronic transactions in 1985. This includes a broad time span, since some current IIM accounts were established in the early part of the 20th century.

From the IRMS/TFAS electronic data, the number of current IIM accounts that existed before 1985 can be estimated. However, the number of transactions and IIM-related documents that exist only as paper transactions is not known and can only be determined by assembling the paper transaction records and compiling a transaction history for each of the IIM accounts. In the Paper Transactions Era, the number of land-based revenue IIM accounts compared with judgment and per capita IIM accounts also is not known. Therefore, while Interior can broadly define Phase 2 work in the historical accounting, a more detailed breakdown of the work is not yet possible.

Phase 3: Former IIM Accounts

Phase 3 comprises all the remaining IIM accounts that were closed prior to December 31, 2000. While there are no electronic data for closed accounts prior to 1985, electronic data support about 250,000 accounts closed during the Electronic Transaction Era. The accounts closed prior to 1985 is (sic) **not estimated at this time. In Phase 3, the closed IIM accounts will be reconciled. The accounts in Phase 3 include former IIM accounts closed due to inactivity, former IIM account holders who received a distribution of proceeds during their lifetime from a closed judgment or per capita account, and deceased account holders whose IIM accounts and**

allotment interests were the subject of probates. Some of these IIM accounts were closed in the Electronic Transactions Era and a portion of their account history will be contained in the electronic data. Phase 3 includes the earliest opened IIM accounts and thus potentially the greatest problems with missing documents. The precise number of former IIM accounts will have to be calculated from an examination of the paper transaction records. Because of the lack of data, the cost estimate for Phase 3 is estimated most likely to change as the historical accounting progresses." *Id.* at 28-29.

This Accounting Priority section of the Report ends with one additional comment of note:

"Interior cannot, at this time, project time frames and a completion schedule for the historical accounting work in Phase I. Instead, if so directed by Congress, Table 3-1 will be used by Interior for planning and task scheduling. The actual historical accounting work will be conducted within the limits of funds appropriated for this purpose." *Id.* at 31.

C. Historical Accounting Costs

The Historical Accounting Costs section of the Report provides estimates of the cost of the historical accounting using cost estimating models and proprietary software of Defendants' contractors. However, the Report notes:

"The estimates for the cost of the historical accounting are only as robust and reliable as the information available to input into the pricing model. Some of the estimates for time and cost are based on the experience with the 1972 to 1992 Tribal Reconciliation project and the Ernst & Young accounting project performed for the IIM accounts of the five named plaintiffs in the *Cobell* lawsuit. However, neither of those projects compare in the number of accounts, transactions, or records that comprise the IIM historical accounting.

Accordingly, there is a high level of uncertainty in the cost estimates for the historical accounting project. Many parameters continue to be investigated and could dramatically change, even in the near future. Looking at the accounting transactional analysis, over 60 percent of the cost of the project is driven by the estimated number of transactions involved and an estimate for the amount of time required performing an analysis of each transactions (sic). A significant error in either or both of these estimates could drive cost lower or higher. The scanning and indexing tasks also possess a wide range of variability in the estimates for the number of paper documents involved.

Based purely upon the experience of Interior's cost contractor, the cost range for the historical accounting could lie between – 5 percent and +25 percent of the estimates in this Report.[14] *Id.* at 36-37.

[14] Of note, the Report also stated that it did not include a cost estimate for any accounting work for tribal trust funds or an estimate for litigation costs relating to tribal lawsuits for their own historical accountings.

The section concludes with a discussion of the potential time period to conduct the historical accounting since cost estimates were made based an assumption using a ten-year historical accounting project estimate. *Id.* at 37. Defendants state:

"However, Interior does not have reliable data to measure the cost effect of compressing or stretching out all the historical accounting project components. A quicker or slower pace will be determined by the funding schedule that Congress adopts. The implications of the funding rate would need to be examined with additional cost estimates as the accounting work proceeds.

….

Because of the breadth of the historical accounting, a firm schedule for the completion of the project cannot be provided. As part of the cost analysis, the estimates are predicated on completion of the historical accounting within assumed time frames, the assumptions being based on how much accounting work can be accomplished over any given period of time and the availability of funding from Congress. *Id.* at 39.

Comparing the historical accounting to the work of the Indian Claims Commission, twenty years or more timeframes for their proposed historical accounting efforts would not be felt by Defendants as unreasonable. They stated:

"And perhaps most important, the sheer number of accounts included in the historical accounting described in this Report represents many times the number of claims examined by the Commission in its 32-year existence. And after an untold number of former and deceased account holders are factored in, the enormity of the task becomes more clear on how much it may actually cost. Therefore, Interior cannot provide a dependable estimate as to when the project will be completed." *Id.* at 40.

D. Confidence in Accounting Results

The Report concludes with a Confidence in Accounting Results section that stated in part:

"Interior is designing a methodology for the historical accounting to produce high quality results, subject to the limitations and availability of the IIM records and data. While Interior expects to discover some errors or variances in the historic IIM account records, Interior has a high level of confidence in the quality of the accounting work that will be performed, and the accuracy and reliability of the accounting results that will be produced using this methodology.

….

See Report at 38.

Interior already has experience conducting historical accountings for judgment and per capita accounts. Based on a pilot project to reconcile a number of judgment and per capita accounts conducted by the accounting firm of Chavarria, Dunne & Lamey (CDL), Interior believes that accurate, reliable historical accountings can be performed on these accounts.

….

Based on these findings, Interior is optimistic that future judgment and per capita accounts can be reconciled with a high level of confidence." *Id.* at 45.

V. ANALYSIS

A. Expectations and Results

This Court and the Circuit Court of Appeals for the District of Columbia left no doubt regarding the standard for and scope of the historical accounting: All funds whenever deposited under the Supreme Court of the United States' *Mitchell II* holding that required the highest common law fiduciary trust standards regarding the trust administration of the IIM account holder beneficiaries' accounts. However, both Courts left it to the Defendants to derive the method to do the historical accounting and acknowledged that there might be legal limitations that could be placed on the accounting. As this Court stated:

"For example, significant legal issues that remain matters for the second phase of this case include: (1) whether an applicable statute of limitations, if any, precludes any of plaintiffs' claims for an accounting; (2) whether an accounting accomplished through a sampling technique will satisfy the requirements of the Trust Fund Management Reform Act; and (3) the precise scope of plaintiffs' certified class." *Cobell v. Babbitt***,** 91 F.supp.2d at 32. n. 22.

And again:

"It should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties. Moreover, the court will not now address other arguments that the government may make in the future on the 'historical' nature of the accounting (e.g., statute-of-limitations arguments). *Id.* at 40, n. 32.

The Secretary of the Interior alluded to these potential limitations in conducting the review of the historical accounting process that she established with the creation of OHTA. As previously noted in this Eighth Report, she stated in her memorandum

referring to her Order creating OHTA to construct a Comprehensive Plan for Congress that:

"Through this comprehensive plan, the Department will *analyze all options, not just statistical sampling,* so that we can demonstrate to Congress, the Court, IIM beneficiaries and the public that we have identified *the most cost-effective plan to complete the historical accounting* and thereby satisfy the Department's fiduciary duty. *Id.* at 2, emphasis added.

In both his reports to the Secretary of the Interior and this Court Mr. Edwards spoke of the "temporal scope" of the historical accounting and the limitations that might be able to be applied to it. Throughout his reports and the Quarterly Reports submitted to this Court following the establishment of OHTA, references to determining the reasonable time period for the historical accounting to assist the Court and Congress were made.

When the Court Monitor recommended to this Court that it address the outstanding motions for partial summary judgment before it to help determine the "temporal scope" of the historical accounting, counsel for Defendants vociferously objected in the Department Of The Interior's Response To The Fifth Report Of The Court Monitor stating:

"Interior has not yet taken final agency action with regard to any of the historical accountings. As described above, many outstanding legal and practical issues (some recognized explicitly by this Court as well as the Court of Appeals) potentially affect the scope of the accounting for particular individual account holders (or subclasses of account holders), including but not limited to the effect of relevant statutes of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and prior settlements of IIM account holders' claims. *Id.* at 16.

Nor did they care to have a Phase II trial date set so that these issues and their decisions about them could be addressed by the Court to flesh out whether the historical accounting as proposed by the Defendants was in compliance with their fiduciary trust obligations to the IIM account holders. *Id.* at 20.

The Special Trustee also raised concerns about the definition of an historical accounting at Interior to the extent of telling the Secretary that he had not heard anyone in the Department define the characteristics of an accounting beyond the funds actually collected by the Department. He stated further that:

It is also my opinion that in the event the trustee fails to provide clear and accurate information to the beneficiary, *all doubts will be resolved against it and not in its favor.*

….

Because it is the duty of the trustee to know all the facts about the administration of the trust, these flaws *cause me to doubt the ability of the Department to show either itself or the beneficiaries in sufficient detail the nature and amount of the trust property and its administration.* *See* **Tab 2** at 2, emphasis added.

The Special Trustee also did not believe that what Mr. Edwards and OHTA had accomplished with regard to the accounting for the judgment accounts constituted an historical accounting. *See* **Tab 3.**

In light of what was expected or required by this Court or Congress, or promised by the Secretary, her subordinates, and counsel, the Report leaves much to be desired. There is no discussion of the method used to determine that even the broadest reading of this Court's and the Circuit Court's opinions would require what Defendants propose. There is no analysis of other methods to accomplish an historical accounting or whether those methods and the legal parameters potentially limiting the accounting, previously addressed by Defendants in the partial summary judgment motions, or others addressed by this Court, have been rejected and, if so, why.

Defendants have described to Congress and this Court an unlimited historical accounting that will take an unknown number of years and cost untold billions of dollars based on an admitted lack of information on which to make such estimates. Listen to their statements:

- **"It is *not feasible to det*ermine the total number of transactions for the IIM accounts since inception**

- **For costing purposes, the total transactions since 1887 *are estimated* at over 100 million**

- ***Interior cannot*, at this time, *project time frames and a completion schedule for the historical accounting* work in Phase 1**

- ***It is not possible at this time to divide the work in Phase 2 because the IIM transaction data are not available in an electronic format***

- **The magnitude of the historical accounting is enormous**

- ***Interior estimates* that the total money collected since 1909 is *approximately* $13 billion**

- **The total cost for the historical accounting *is estimated* to be $2.4 billion**

- **The *estimates for the cost of the historical accounting are only as robust and reliable as the information available* to input into the pricing model**

- **Accordingly, *there is a high level of uncertainty in the cost estimates* for the historical accounting project**

- ***Many parameters continue to be investigated and could dramatically change*, even in the near future**

- **Because of the breadth of the historical accounting, *a firm schedule for the completion of the project cannot be provided***

- **Therefore, *Interior cannot provide a dependable estimate as to when the project will be completed* (***See*** generally, Report, emphasis added.)

In what can only be described as the height of understatement, Defendants describe obstacles to be faced in the historical accounting as they have outlined it:

- **The electronic records may have erroneous entries, missing information, duplicate accounts, and gaps in data**

- **Some paper records may have been destroyed in accordance with document retention schedules at Interior, Treasury, or the General Accounting Office**

- **Other paper records may have been damaged, may be missing, or may be in a condition too poor to use**

- **Leases, contracts, right-of-way agreements, and other instruments may no longer be available**

- **The extent to which these matters may affect meeting the accounting standard cannot be known until the accounting work proceeds and reports to IIM account holders are prepared** (*Id.* at 12-13.)

However, hope springs eternal. Defendants expressed a high confidence level in the accuracy of the historical accounting or, at least those accountings of judgment and per capita accounts that apparently have been done or are still being accomplished:

- **…Interior has a high level of confidence in the quality of the accounting work that will be performed, and the accuracy and reliability of the accounting results that will be produced using this methodology**

- **…Interior is optimistic that future judgment and per capita accounts can be reconciled with a high level of confidence** (*Id.* at 45.)

The result of this exercise, on its face, casts doubt on both Defendants' ability to conduct the historical accounting and their sincerity regarding any legitimate effort to try. The Report repeatedly emphasizes and repeats the proscription of Congress in its Conference Committee Reports regarding either the statistical sampling historical accounting or

whatever accounting Congress would receive in response to its direction for a comprehensive and detailed plan for the historical accounting.

- **…Congress has also indicated a reluctance to 'appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful.** *Id.* at 5.

- **(Congress) will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful. If the Department, working with the plaintiffs and the Court, cannot find a cost effective method for an historical accounting, the Congress may have to consider a legislative remedy to resolve this and other litigation related issues.** *Id*. at 10.

The question remains, however: why propose such a patently fiscally offensive (apparently at least, in Defendants' belief, to Congress) method of conducting the historical accounting without so much as addressing any of the possible accounting methods addressed by this Court for providing for a more feasible and legally acceptable outcome? Did OHTA run out of time? Are the records in such a bad way that this is the only possible solution to the historical accounting – to make assumptions that the electronic data is accurate or that the lost records can be found or recreated in other ways and that, therefore, the complete historical accounting, something Defendants' have always opposed, is now not only legally required but possible?

And why have Defendants not addressed what they stated so often in the past was necessary to determine the "temporal scope" of the accounting – the legal issues surrounding whether any limits could be placed on the historical accounting that might significantly reduce the cost of the accounting. If this Court had agreed with their previously filed partial summary judgment motions or other legal analysis hinted at by Mr. Edwards in his past reports on issues such as statute of limitations defenses and the effect of probate rulings on past accounts, the historical accounting would be limited in scope and the billion dollar estimates of the cost of a 1887 – 2000 accounting would not likely be necessary.

Defendants began their first attempt to conduct the historical accounting in 2000 by requesting advice from the IIM account holders and the public through a Federal Register notice. In that notice (**Tab 4**) which they provided to this Court, they stated[15]:

"As directed by Congress, the Department is continuing development of a reconciliation process to evaluate the reliability of past account activity. This notice initiates an information gathering process with IIM account beneficiaries, and the public, to comply with Congressional directives to determine the most reasonable methods for providing accountholders with information to evaluate their actions

[15] *See* Motion for Entry of an Order Regarding a Public Administrative Process to Implement The American Indian Trust Fund Management Reform Act of 1994, filed with this Court on March 1, 2000.

and to determine whether there are discrepancies due to past management practices. *Id.* at 17521.

….

Each approach would require some tradeoff among the level of precision of account information provided to beneficiaries, the cost of obtaining and providing information, the impact on BIA's and OST's other responsibilities, and time needed to develop a basis for compensation.

….

Past proposals to perform IIM reconciliation have been dismissed by Indian groups and Congress as being too expensive for the limited information produced.

….

Many of these proposals were dismissed by Congress, the Monitoring Association ("ITMA") as not being worth the cost. *Id.* at 17525.

….

Another factor to be considered is the cost of the process. While achieving the goals of this notice is likely to be expensive regardless of which approach is selected, there is a very large cost range within the various options – from millions of dollars for the sampling or settlement approach to hundreds of millions or more for a traditional transaction-by-transaction reconciliation for all accounts.

….

Using this estimate as a guide, it is reasonable to conclude that merely collecting and organizing – but not analyzing – documents for the approximately 300,000 current accountholders would cost hundreds of millions of dollars.

….

Moreover, a process that takes many years to complete will continue to consume the finite resources of the Bureau which accountholders may believe should be better expended on other programs of benefit to Indian people.

….

(g)iven the enormous scope and costs of an account-by-account, transaction-by-transaction reconstruction, it is unlikely to expect that Congress would provide the

Department with the staggering appropriations needed to fund such a process. *Id.* at 17526.

The IIM account holders responded overwhelmingly that they wanted a transaction-by-transaction accounting only to have Defendants concoct a statistical sampling approach to the historical accounting that had been decided on by Defendants prior to their receiving the tabulated results of the advice of the IIM account holders.[16]

Their reasoning for failing to accept the IIM account holders' advice was that such an accounting would never be authorized by Congress due to the cost of the accounting.

Having abandoned the statistical sampling approach after first adopting her predecessor's memorandum ordering it, the present Secretary has taken the same approach this time – raise the overwhelming cost estimate of the historical accounting with Congress. It would again appear that Defendants still hold out hope that Congress will legislate away the Defendants' fiduciary trust obligations to the IIM account holders.[17]

B. Congress' Requirement For An Historical Accounting Plan

Defendants are wrong if their view is that Congress will refuse to honor the United States' fiduciary trust obligations to the American Indian as required by the 1994 Reform Act. Congress has not stated it would refuse to fund an historical accounting that could guarantee that the IIM account holders would receive an accurate and complete accounting of their land, resources, and monies owed to them.

While the Report's foreword did not fully quote the Conference Report on the 2001 Interior budget leaving the possible impression in the reader's mind that Congress would not be willing to fund more than a statistical sampling or some other type of limited historical accounting, Congress began their appropriation language by stating in part:

"While the Indian Trust Fund Reform Act contemplated that such an accounting would sometime occur, the managers have been concerned for years about the potential cost and *effectiveness* of any approach that might be used. After investing $20 million over five years in a tribal account reconciliation process, there has been no resolution of issues surrounding tribal accounts. The cost of a similar accounting for the approximately three hundred thousand IIM account holders could conceivably cost hundreds of millions of dollars." *See* Eighth Report at 12, n. 9, emphasis added.

And in the 2002 Interior budget appropriations Congress also stated:

"The managers reiterate the position that they will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted

[16] *See*, generally, First Report of the Court Monitor.
[17] And, also, those to the Tribal trust beneficiaries.

reconciliation process *whose outcome is unlikely to be successful*." *Id.* at 13, n. 9, emphasis added.

This Court and the Circuit Court have interpreted the 1994 Reform Act as requiring an "all funds" historical accounting. Congress has recognized that fiduciary Indian trust obligation in its appropriations language passed since the Courts' decisions. What they have reiterated is that they are concerned that Defendants, having never been able to conduct any type of an accounting that has been accepted as accurate and complete, will once again fail to do so in attempting to accomplish the historical accounting mandated by them and waste additional hundreds of millions of dollars.

C. The Report As Final Agency Action

Defendants have tried to prevent this Court from reviewing their historical accounting activities during the preparation of this Report. They have claimed that they are entitled, once again, to APA protection from this Court's review and ruling on their Report and their accounting activities until "final agency action' has been taken by the Secretary on the recommended actions to carry out the historical accounting.

What Defendants ignore in their arguments to this Court is the recognition that this Court and the Circuit Court's decisions clearly stated that, with regard to the government's obligation to provide the IIM account holders with an historical accounting, final agency action has already occurred. First, this Court's holding:

"In sum, the court concludes that Interior's reasonable time to discharge the four specific fiduciary duties declared above had expired. Judged in the context of the exacting nature of defendants' fiduciary duties, the admitted 'long delay' in discharging these duties, and the nature of plaintiffs' irreparable injuries, the court believes that this conclusion is inescapable. On the facts of this case, even five years would be an unreasonable amount of time to delay these five fundamental planning requirements." *Id. at 48.*

Broadening this Court's holding on what final agency action had been unreasonably withheld, the Circuit Court, in affirming this Court's Order, stated:

"The district court's findings of fact, largely unchallenged by the government, make clear that insofar as the federal government owes trust beneficiaries a duty to maintain records and provide an accounting, delaying review is tantamount to denying review altogether. The district court concluded that appellants' extensive delay in discharging their fiduciary duties was unreasonable. In such circumstances, federal courts may exercise jurisdiction to compel agency action 'unlawfully withheld or unreasonably delayed.'"

Even assuming, as appellants argue, that the 1994 Act effectively reset the clock for a finding or unreasonable delay, appellants' 'reasonable time to discharge' its fiduciary obligations 'has expired.'

….

Concern for 'administrative convenience' certainly counsels against interfering with the government's reform priorities. ('Although the APA gives courts the authority to 'compel agency action unlawfully withheld or unreasonably delayed…')

….

The actual legal breach is the failure to provide an accounting, not its failure to take the discrete individual steps that would facilitate an accounting. Thus, while the district court must amend its opinion on remand to account for this distinction, there is no need to alter the district court's order, as the bottom line is the same: By failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, appellants breached their duties." *Id.* at 1095-1106.

This Court had and has the jurisdiction to review the Report and the actions taken by the Defendants, if any, to begin to conduct the historical accounting that has so long been unreasonably delayed by Defendants. There is no new final agency action required before this Court can consider the status and potential for success of the Defendants' proposed historical accounting. Defendants do not get a second bite at the APA "apple."

Once this Court determines that the Report sets out a reasonable and fiduciary sound method for accomplishing the accounting, it would then seem timely for Defendants to begin the appropriations process. The Congress has indicated that this Court should first address a solution to the historical accounting conundrum before it acts:

"If the Department, working with the plaintiffs and the Court, cannot find a cost effective method for an historical accounting, the Congress may have to consider a legislative remedy to resolve this and other litigation related issues." *See* Report at 10.

D. Legal Standards For The Historical Accounting

The Report, and Deputy Secretary Griles' June 18, 2002 testimony before the Senate Committee on Indian Affairs, exhibit a remarkable lack of knowledge about and understanding of the legal and fiduciary trust standards under which a trustee must conduct accountings for beneficiaries in general and for the IIM account holders, plaintiffs in the *Cobell* litigation, specifically.

As quoted above, this Court put Defendants on notice in its December 21, 1999 decision that claims of lack of funds cannot be allowed to impair the trustee-delegate's exacting fiduciary trust duties toward the management of the IIM trust. However, as also discussed previously, Defendants have continued to cite the potential lack of funding for a reason for not pursuing a proper historical accounting. Now, their Report places the

issue of funding once again before Congress. They have stated that billions of dollars must be allocated for the Defendants to attempt to reconcile and account for missing and destroyed hard copy records and incomplete, inaccurate, and missing electronic data records.

That the Defendants still do not accept that they have the highest fiduciary duty to carry out the historical accounting, and all trust operations regarding the IIM account holders, is obvious from Deputy Secretary Griles' testimony in response to Senator Inouye's question regarding the legal standard under which all trust reform and trust operations under his supervision must comply. Mr. Griles replied by stating that the Bush administration was looking for an answer to "the fundamental question" of these "evolving responsibilities." He indicated that the Supreme Court of the United States would be the source of that answer upon its decisions in two Indian tribal lawsuits accepted for review by that Court during its next term.

Mr. Griles stated he was not a lawyer. But he also stated in testimony before the House Subcommittee on Appropriations that he was in charge of the attorneys defending Defendants in the *Cobell v. Norton* litigation. Apparently, those attorneys have not apprised the Deputy Secretary that the *Cobell* decisions by this Court on December 21, 1999 and that of the Circuit Court on February 23, 2001 are the controlling law under which Defendants must conduct their trust operations until (and if) changed by the Supreme Court's decision on the seminal issue of the fiduciary trust obligations of the United States to Indian beneficiaries under its *Mitchell II* decision. Those decisions, relying on the *Mitchell II* decision, set the highest fiduciary standard for trust obligations regarding the Indian Trust as required by common law trust standards.

That the counsel for Defendants have consistently fought in this Court and on appeal against the application of this standard to Defendants' operations of the Indian Trust and the management of the IIM account holders' interests is common knowledge gained from a cursory review of their briefs and the Courts' opinions. That they have known since February 23, 2001 what was the fiduciary standard with which Defendants' must comply in conducting the historical accounting is beyond cavil.

That the Deputy Secretary and, apparently, the Secretary[18], still believe the fiduciary trust standard is "evolving" regarding the Indian Trust is some explanation of why they may

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[18] In her written testimony submitted on February 6, 2002 to the House of Representatives Committee on Resources the Secretary discussed her view of this standard: **"Third, the Department's longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is *moving us toward* a private trust model.**

….

A guiding principal of the *Mitchell* decisions is that *a fiduciary obligation* of the kind that would support a cause of action for money damages against the United States *must be clearly established in the governing statutes and regulations*." *See* Testimony of Gale A. Norton, Secretary of the Interior before the Committee on Resources, U.S. House of Representatives, February 6, 2002 submitted to this Court on February 5, 2002 in Defendants' "Notice of Filing of Statements of Proposed Testimony of Secretary of the Interior and Special Trustee for American Indians Before The House of Representatives

be pursuing, once again, a limitation of their obligations to conduct a full historical accounting. On one hand they present a Report for a full "all funds" transaction-by-transaction historical accounting costing billions of dollars and, on the other, make the clear inference in the Report that Congress should limit that same accounting.[19]

E. The Possibility That Defendants Cannot Accomplish An Historical Accounting

While the Defendants state in their Report that they have confidence in their accountants and their ability to do the historical accounting, in the same breath they acknowledged that they have no idea of how many records will not be locatable or have been destroyed and no concept of the time frame in which to complete the historical accounting. Based on the record of destroyed documents and insecure data bases made matters of record in the six years of this litigation, the GAO letter reporting massive destruction of IIM account holder records, and the inability of the Defendants to bring about meaningful trust reform, the possibility of an accurate and complete historical accounting ever being completed in the lifetime of the living IIM account holders is suspect. Therefore, the question must be asked if it is not time to consider that the Secretary, trustee-designate for the Indian Trust, not only will not – *but also cannot* – provide the historical accounting mandated by Congress and ordered by this Court.

As this Court and others have noted, a trustee cannot avoid his duty to the beneficiaries by stating he cannot properly manage his trust obligations. The beneficiaries are entitled to an accounting of their land, resources, and assets. In the matter at hand, they are entitled to an historical accounting of the monies that they were given or owed. If that is impossible as it apparently is, then there must be another solution to satisfy the fiduciary trust obligations of the Unites States to the IIM account holder beneficiaries.

Committee on Resources at Tab 1, 10-12, emphasis added.

Neither statement bears examination as a correct description of the current state of the law regarding the Secretary's fiduciary obligations to IIM account holders. In a prophetic statement before the same House committee, Special Trustee Tom Slonaker addressed Defendants understanding and compliance with their fiduciary duties:

"Until a better understanding of the trust obligation, better management, and more accountability are in place – regardless of what the trust organization looks like - - it will be difficult for the Government to come into compliance with the 1994 Act." *Id.,* Tab 2 at 2.

[19] That at least the House Committee on Appropriations may have accepted that inference is obvious from the proposed appropriations language recently enacted. *See* page 33, n. 20, infra.

VI. CONCLUSION AND DISCUSSION

The Historical Accounting Ordered By This Court Has Not Been Accomplished And May Never Be Accomplished Without The Further Involvement Of This Court To Resolve Defendants' Continuing Breach Of Trust By Conducting A Phase II Trial

It has been eight years since the passage of the 1994 Reform Act that mandated the historical accounting. It has been two and one half years since this Court ordered it to be properly carried out under the *Mitchell II* standards. It has been one and a half years since the Circuit Court affirmed this Court's decision. The Special Trustee has stated that no proper historical accounting can be constructed:

"Because of the incomplete nature of the IIM records and the lack of any security measures designed to protect the trust data in the numerous data systems employed within the Department over the years, I do not believe an accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed. Short of settlement, the best that might be able to be accomplished is the identification of the gaps in the information. With that, the Department could, perhaps, seek some instructions from the Judge on how to proceed. I remain concerned, however, that I have not heard anyone in the Department define the characteristics of an accounting to include anything more than the funds actually collected by the Department. That, of course, is inadequate."[20]

The Defendants in their Report confirm the Special Trustee's worst fears. The Report on the proposed historical accounting illuminates just how relative little correct and locatable information is available that could serve as a foundation for an accurate and complete accounting that addresses not only the funds but the land and resources that have formed part of the IIM account holders' trust corpus for over a century.

Defendants' estimate of billions of dollars to complete what they cannot ensure for the Congress or this Court will be an accurate and complete accounting is stark testimony to the improbability of Defendants ever completing the historical accounting in the manner they have chosen. Nor have they apparently considered any of the other alternatives that may exist to carry out a proper historical accounting and limit the costs.

It is Defendants' responsibility – *a trust fiduciary obligation to American Indians of the highest order* – to offer some method to bring about an accounting that this Court and Plaintiffs, IIM account holder beneficiaries, could accept.

This Court has provided for an examination of the Defendants' historical accounting progress by bifurcating the *Cobell* litigation into two phases. One of those phases – Phase II – was to be a trial on the adequacy of the historical accounting. That trial would

[20] *See* Seventh Report, Tab 11 at 3.

include not only an examination of the Defendants' efforts to conduct that accounting, it also would address Plaintiffs' challenges to that accounting and their own solutions to the Defendants' quandary.

However, this Court has not addressed at trial whether Defendants have found any method, least of all a cost effective one, for conducting an accurate and complete historical accounting. And Congress, as one of three branches of the United States who is the ultimate trustee for the Indian Trust, also has the responsibility for ensuring that the IIM account holder beneficiaries (as well as all Tribal beneficiaries) receive the accounting and the monies designated by that accounting that they are due. Congress, acknowledging this responsibility, has indicated it will wait for this Court to pursue resolution of the historical accounting morass. Nor should Congress consider limiting that accounting by accepting an argument that Defendants should not be required to do more than account for existing funds listed in unprotected, vulnerable and incomplete electronic databases and hard copy records going back only to 1985 unless this Court holds that it would be legally and practically tenable to so conduct the historical accounting.[21]

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[21] The Court Monitor has recently received a copy of the July 2002 House Committee on Appropriations' Report and accompanying draft bill making appropriations for the Department of the Interior and Related Agencies for the fiscal year ending September 30, 2003 (**Tab 5**). Language in that bill would limit the historical accounting:

> **"For operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $141,277, 000, to remain available until expended, including not to exceed $15,000,000 to perform a historical accounting of each Individual Indian Money Account open on December 31, 2000, covering the period from the date on which the account was opened or January 1, 1985, whichever is later, to December 31, 2000; Provided, That hereafter no funds provided under this or any other Act shall be available to conduct a historical accounting of Individual Indian Money Accounts other than an accounting for the period specified in this Act of accounts open on December 31, 2000, unless such accounting is specifically provided for in a subsequent Act of Congress."** *Id.* at 50

The Committee provided reasoning for this limitation:

> **"The Committee has also included a provision limiting the historical accounting to a more defined period. By limiting the historical accounting, the Committee will focus its limited resources on a manageable group of accounts for which results can be produced within a reasonable period of time and at a more reasonable cost. By specifying the starting date for the accounting, it is the Committee's intent that the balance in each account as of that date shall be accepted as correct for purposes of the accounting. This provision also includes language limiting, until further action by the Congress, any historical accounting beyond that described in the provision."** *Id. at 89.*

This language, if enacted by the Congress, would amend the 1994 Reform Act limiting the historical accounting to a reconciliation of available electronic and hard copy records from 1985 forward and accepting as accurate the balances in the accounts of IIM account holders as of that date. This would be the result regardless of what the hundred-year history of the DOI's misfeasance and malfeasance regarding the management of those and other accounts might reveal about the inaccuracies in them and the actual sums owed to past and present account holders. However this language made its way into this proposed bill, it would effectively revoke the 1994 Reform Act's mandate for the historical accounting and Congress' acknowledgment that the Unites States owed a fiduciary obligation to the American Indian trust beneficiaries to provide them with an accurate and complete historical accounting.

Therefore, it is respectfully recommended that this Court set an immediate trial date for the Phase II historical accounting trial and authorize discovery on the Defendants' and their consultants' and contractors' research for and preparation of the Report, their accounting activities to date, and any other research into accounting methods that they may have considered and accepted or rejected. This discovery should include what efforts if any the Defendants have made to involve the Special Trustee or other trust experienced officials in the process of preparing the Report and conducting whatever accountings are under way at the present time.[22]

VII. REMARKS

Defendants continue to display recalcitrance in their attempts to avoid their fiduciary trust obligations as Trustee-designate. It again falls to this Court to right the historical wrong done to the American Indian and, with respect to this litigation, the IIM account holder beneficiaries. This Court has tried mightily for over six years to do justice and correct this historical wrong. It has noted that little progress, if any, has been made.

But time is running out for many of the plaintiff class in this litigation. As the Circuit Court noted in its February 23, 2001 opinion:

> **"Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus it seems that 'the interests at stake are not merely economic interests in (an administrative scheme), but personal interests in life and health."** *Cobell,* 240 F.3d at 1097, citations omitted.

And again:

> **"…(I)t is beyond question that the government has delayed fulfilling its trust obligation for many years. The district court specifically found that IIM trust beneficiaries have been denied their rights – in particular their right to an accounting – for decades. That Congress enacted its own remedial statute to address this unconscionable delay does not mitigate the egregious amount of time plaintiffs have waited for. As discussed below, the 1994 Act is not the source of plaintiffs' rights. Rather, it is designed to help rectify the government's longstanding failure. Given the record before it, the district court reasonably concluded that absent court intervention, discharge of the government's fiduciary obligations may yet be far off.** *Id.* at 1096.

[22] The Special Trustee offered to help Mr. Edwards and OHTA determine what was required of a trust fiduciary to carry out an historical accounting. There is no evidence in the record that his offer was ever accepted or that any trust official agreed that the Report's proposal constituted a proper fiduciary trust historical accounting. It should be noted that the Report talks in terms of the future engagement of "law firms with experience in trust law to provide experienced, independent review of accounting results." *See* Report at 46. However, apparently no experienced trust official or attorney was consulted on whether the Report's proposal has any hope of providing an accounting capable of qualifying as a trust historical accounting.

The Circuit Court also made clear that this Court had the power and obligation to continue to intervene in this case to ensure the government discharged its fiduciary obligations to Plaintiffs:

"Moreover, while the court should (and did) remand to the agency for the proper discharge of its obligations, the court should not abdicate its responsibility to ensure that its instructions are followed. This would seem particularly appropriate where, as here, there is a record of agency recalcitrance and resistance to the fulfillment of its legal duties." *Id.* at 1109.

The Defendants have not met, but must meet, an exacting standard of trust fiduciary obligations to Plaintiffs that has not been modified or weakened by the Supreme Court of the United States. They must comply with the Circuit Court's description of that standard:

"The federal government has 'charged itself with moral obligations of the highest responsibility and trust' in its relationships with Indians, and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Id.* at 1099, citations omitted.

Defendants have not come close to meeting these trust standards owed to the IIM account holders for all their statements and testimony to this Court of their good will and commitment to trust reform. They have scoffed at their fiduciary trust and moral obligations that their counsel have contended they do not have under the Administrative Procedures Act and the "evolving standards" of Indian trust law. Their historical accounting proposal in the Report is just one more example of the continuing historical unwillingness and inability of the Department of the Interior, as an institution, to honor its trust obligations to the American Indian.

Copies of the Eighth Report of the Court Monitor have been provided to:

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